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Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' REPLY BRIEF

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I.

Restatement of Issue

The precise issue which this case presents is wnether the fiction of *situs* through average presence, relied upon by Appellees, can, under the Constitution, be applied to Appellants' containers (foreign-owned instrumentalities used exclusively in foreign commerce) so as to create an actual presence sufficient to permit the valid assessment of a general local property tax. Regardless of the use of this test in connection with property owned by domestic persons, as sanctioned by this Court in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1890), *and Braniff Airways,*

Inc. v. *Nebraska State Board,* 347 U.S. 590 (1943), it is not applicable in the instant situation where the United States has clearly stated that the imposition of such tax upon Appellants' containers constitutes an impermissible interference with its exclusive right to regulate foreign commerce in an area where the Nation must speak with one voice.

II.

The Tax as Imposed Constitutes an Improper Interference with the Foreign Relations of the United States.

The Brief for the United States clearly sets forth its interest to "develop and facilitate the use of containers in international commerce". Brief for the United States at 28. It is expressly stated therein that the imposition of the property tax in question "would frustrate accomplishment of the federal objective in allowing temporary free admission to the containers under bond" and "[lessen] the effectiveness of the federal regulation by burdening foreign-owned containers with a multiple tax burden that hinders the use of such containers in our foreign commerce." Brief for the United States at 28-29.

A concise summary of the current status of the effect of foreign policy considerations upon a related provision of the Constitution, the Import-Export Clause, is found in *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976) and *Department of Revenue* v. *Association of Washington Stevedoring Companies,* —— U.S. ——, 98 S. Ct. 1388 (1978). In the concurring opinion in *Washington Stevedoring Companies,* it was stated as follows:

> "In *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976) this Court abandoned the traditional formalistic methods of determining the validity of state levies under the Import-Export Clause and applied a functional analysis based on the exaction's relationship to the three policies that underlie the Clause: (i) preservation of uniform federal regulation of foreign relations; (ii) protection of federal revenue derived from imports; and (iii) maintenance of harmony among the inland States and the seaboard States. The nondiscriminatory *ad valorem* property tax in *Michelin* was held not to violate any of those policies, but the Court suggested that even a nondiscriminatory tax on goods merely in transit through the State might run afoul of the Import-Export Clause." 98 S. Ct. at 1405.

This is the situation which exists in the instant case. It can be remedied by the Court's invalidation of the "property tax" as applied to Appellants' containers.

In addition, and wholly aside from considerations of foreign policy under the Import-Export Clause referred to by the Court in the *Michelin* and *Washington Stevedoring Companies* cases, the adverse impact which the tax in issue creates upon the foreign relations of the United States clearly constitutes a violation of the Commerce and Supremacy Clauses of the Constitution.

Appellees argue that the fear of multiple tax burdens may not, in itself, constitute a proper constitutional concern. However, in the highly sensitive field of international transportation of goods and persons (traditionally subject to regulation and taxation upon a national governmental level, rather than a local governmental level), when the imposition of any such regulation, including the instant tax, directly and adversely affects the reliance interests of foreign governments, such a tax produces a serious and adverse effect upon the foreign relations of the United

States. This point has been confirmed by the Brief for the United States.

Moreover, angry and unreasoned polemics to the contrary notwithstanding, there must be reasonable limits upon the taxing powers of the States, under the Commerce, Supremacy, Treaty and Import-Export Clauses of the Constitution, when such taxing powers are exercised in a manner that produces adverse effects upon the foreign relations of the Nation. *See, Brown* v. *Maryland,* 25 U.S. (12 Wheat.) 448 (1827). It is not the role or function of state or local governments to determine what actions on the part of state and local governments may adversely impact upon the foreign relations of the United States.[1] The

[1] *See,* Hartman, *State Taxation of Interstate Commerce* 1 (1953), wherein the author commenced his treatise as follows:

> "That great jurist and pragmatist, Oliver Wendell Holmes, Jr., once wrote that while he did 'not think the United States would come to an end if we lost our power to declare an Act of Congress void,' he did 'think the Union would be imperiled if we could not make that declaration as to the laws of the several states.' [1] The reason Justice Holmes gave was that 'one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end.' He was thus expressing in vigorous and dramatic form the need for harmonious coordination of power between the national and state governments as a prerequisite for the functioning of our federal system. Implicit in Justice Holmes' idea that judicial review of state action is indispensable for the preservation of the federal system is the judicially recognized danger that encroachments by a State upon interests outside its borders are not likely to be curbed through political restraints.[2]
>
> [1] Holmes, Collected Legal Papers 295-96 (1920).
>
> [2] Marshall recognized this danger in McCulloch v. Maryland, 4 Wheat. 316, 435-36 (U.S. 1819). Justice Stone's thinking also embraced this idea. See Helvering v. Gerhardt, 304 U.S. 405, 412 (1938); South Carolina State Highway Dep't v. Barnwell Brothers, Inc., 303 U.S. 177, 185 n. 2 (1938). See Dowling, The Methods of Mr. Justice Stone in Constitutional Cases, 41 Col. L. Rev. 1160, 1171 (1941)."

Court has requested the Solicitor General to express the views of the United States on this question and he has done so. Apparently dissatisfied with the one voice with which the Nation has spoken on this question, Appellees and their *Amici* would arrogate to themselves the final say in what is to be considered a matter affecting the foreign relations of the Nation, within the meaning of that term from the standpoint of the Commerce, Supremacy, Treaty and Import-Export Clauses.

Appellees would have the Court believe that the pattern of Federal action and Federal interest in the area of regulation of international transport, as described in Appellants' Brief and the Brief of the United States, is not sufficient to pre-empt the area, and thus prohibit the imposition of a personal property tax on foreign-owned instrumentalities used exclusively in foreign commerce, based upon the fiction of average presence. Appellees argue that the only means by which such a result could be achieved is through the enactment of specific legislation by the Congress.[2]

There are numerous areas of exclusive Federal interest, particularly in the field of foreign relations, where the Executive Branch of the government may choose to operate pursuant to diplomatic channels, rather than on the

[2] For this proposition, they cite ***Moorman Manufacturing Co.*** v. *Bair,* —— U.S. ——, 98 S. Ct. 2340 (1978). The *Moorman* case did not involve any foreign policy matter, such as that involved here, in which the Federal government maintains overriding control. Rather, it involved the question of the allocation of tax solely of a domestic taxpayer among states. Moreover, the issue in that case had been considered by the Congress on a number of occasions without enactment of any specific legislative solution on this question. *See,* H.R. 11798, 89th Cong., 2d Sess. (1965); H.R. 16491, 89th Cong., 2d Sess. (1966); S. 317 92d Cong., 1st Sess. (1971); H.R. 1538, 92d Cong., 1st Sess. (1971); S. 1245, 93d Cong., 1st Sess. (1973); H.R. 977, 93d Cong., 1st Sess. (1973); S. 2080, 94th Cong., 1st Sess. (1975); and H.R. 9, 94th Cong., 1st Sess. (1975).

basis of a specific legislative scheme. *See, e.g.*, 22 U.S.C. §2656, which authorizes the Department of State to perform such duties respecting foreign affairs as the President of the United States shall direct without further action by Congress.

More particularly, Appellees' argument that the lack of specific legislative action precludes any Federal preemption is patently insupportable in that it disregards the established law on this question. The Court answered this point simply in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945) in the following terms:

> "For a hundred years it has been accepted constitutional doctrine that the Commerce Clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests."

See, also, Gibbons v. *Ogden*, 22 U.S. (9 Wheat) 1, 187-198 (1824), where the Court stated: "[t]he power to regulate commerce with foreign nations is an express grant by the people to the Federal government"; *and Freeman* v. *Hewitt*, 239 U.S. 249, 252 (1946), where the Court stated: "[t]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States."

II.

Appellants' Containers Are Foreign Owned Instrumentalities Continuously in Transit in Connection with the Import and Export of Goods and Are Exempt from Property Tax under the Import-Export and Commerce Clauses.

The record clearly establishes that Appellants' containers, which are foreign owned instrumentalities of commerce, are continuously in transit and are used exclusively in the import or export of cargo in foreign commerce. It is settled law that the imposition of state or local tax upon property in transit in connection with the import or export of goods is invalid under both the Import-Export and Commerce Clauses. The following statement of Chief Justice Taney in the *License Cases*, 46 U.S. (5 How.) 505, 575-576 (1847), was cited with approval by the Court in both the *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534, 540, n.6 (1959), and *Michelin*, 423 U.S. at 290, cases:

> "The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which

> they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State."

As regards the invalidity of such a tax under the Commerce Clause, the Court in *Minnesota* v. *Blasius*, 290 U.S. 1 (1933), set forth the governing principles as follows:

> ". . . [t]he States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit'. . . .
>
> • • •
>
> Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power." 290 U.S. at 9-10.

The Court in *Michelin* specifically recognized that even where a state non-discriminatory *ad valorem* property tax operated as no more than a transit fee upon property in

transit through the state, such tax would be invalid under both the Import-Export Clause and under traditional Commerce Clause analysis. *See, Michelin*, 423 U.S. at 290.

The tax imposed by Appellees in the instant situation operates as a tax on property in transit and is, therefore, invalid.

IV.

The "Average Presence" Test Is a Constitutionally Impermissible Basis upon Which to Impose Property Tax upon Foreign-Owned Instrumentalities Used Exclusively in Foreign Commerce.

The instant case is one of first impression for this Court in that it is the first time the Court has directly considered the constitutionality of the imposition of a general property tax upon foreign-owned instrumentalities, which pass through the relevant taxing jurisdictions only upon an "in transit" basis, as part of an international shipment. The taxation of such foreign-owned instruments of international traffic has traditionally been dealt with by the United States and its trading partners on the basis of reciprocal exemption, whether by means of the "Home Port" doctrine or any other applicable basis, such as pure reciprocity, as in the case of the Federal Republic of Germany. *See also*, 46 U.S.C. §§ 121, 141 and 142.

That the decision below represents the first time since the founding of the Nation in which the imposition of state or local property taxes have been sustained upon foreign-owned instrumentalities used exclusively in foreign commerce, strongly suggests that state and local governments have for nearly two hundred years recognized and accepted the applicability of the "Home Port" doctrine in regard to

foreign-owned instrumentalities. Appellees and their *Amicus*, the Multistate Tax Commission (the "MSTC"), question the existence of any such doctrine on the part of the United States. The Brief for the United States confirms, in the clearest of terms, the perception on the part of the United States and its trading partners regarding the adherence to such custom.[3] The failure on the part of state or local governments in the United States to levy any such tax for nearly two centuries eloquently testifies to the existence of such accepted custom on the part of state and local governments.

Appellees have relied heavily upon two decisions, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1890), *and Canadian Pacific Railway Co.* v. *King County*, 90 Wash. 38, 155 P. 416 (1916), which they cite in support of the argument that foreign-owned containers, used exclusively in foreign commerce and passing through their jurisdictions only upon an "in transit" basis, are to be subject to the same treatment as foreign-owned rolling stock. The argument of Appellees on this point is insupportable for at least two reasons.

First, Appellees' analysis of the above two decisions is faulty in that neither case appears to have involved foreign-owned instrumentalities used exclusively in foreign commerce. In the *Pullman's Palace Car Co.* case, the entity subject to the capital stock tax was an Illinois corporation, rather than a foreign or non-U.S. person. Appellants recognize that the property of any domestic entity can be subject to an apportioned property tax by state or local governments on the basis of an assumed

[3] *See, Cooley* v. *Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 298, 311 (1851), in which the Court determined the imposition of pilotage fees by the Port of Philadelphia to be reasonable in view of the fact that commercial states and other countries imposed similar requirements.

average presence. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1890); *Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S. 590 (1943); *and, Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952). Under the circumstances present in this case, however, where there is an established international practice of exempting foreign-owned instrumentalities used exclusively in international commerce, the imposition of the tax would, in the view of the United States, interfere with foreign policy and foreign relations of the Nation. *See,* Brief for the United States at 7, 14-32.

The *Canadian Pacific Railway Co.* case (which in any event does not constitute binding precedent upon this Court) would appear, on the basis of the scant facts reflected in the record, to have involved the imposition of property tax by the State of Washington upon property used in an intrastate activity. The rolling stock of the foreign railroad considered in that case appears to have been used between two points within the State of Washington.

The second major area in which Appellees' analogy of foreign-owned containers to foreign-owned rolling stock is invalid is that the supposition advanced by Appellees as to the treatment by state and local governments of foreign-owned rolling stock, appears to be totally incorrect. Appellants understand, on the basis of discussions with legal counsel and representatives of both domestic and foreign-owned railroads, that foreign-owned rolling stock, which enters the United States, is not, and has not been, subject to local property taxation. On the contrary, it is understood that the rolling stock of foreign railroads or car companies, which are made available to domestic railroads, upon a *per diem* or lease basis, are subject to property taxation, *the incidence of which falls entirely*

upon the domestic carrier, rather than upon the foreign owner.[4] Any such exemption afforded by the State of California with respect to domestic motor carriers which transport Appellants' containers, either from any motor vehicle registration tax (*See,* Appellees' Brief at 20) or from any *ad valorem* property tax, such as that which state and local governments (apparently including the State of California) impose on domestic railroads transporting foreign-owned rolling stock, can in no way be regarded as dispositive of this issue, imbued as it is with important foreign policy ramifications. Any such exemption that may be afforded must be considered a purely voluntary and gratuitous act on the part of the State of California.

It is submitted, moreover, that the application of the "Home Port" doctrine in the limited manner advocated by the Appellants and their *Amici* (other than the *Amicus* International Container Lessors Institute), *i.e.,* only in the case of unquestionably foreign-owned and foreign-domiciled instrumentalities, used exclusively in foreign commerce, would not deprive state and local governments of revenues designed to recoup the cost of any services reasonably allocable to the property in question.[5] There is no constitutional or other prohibition that would prevent Appellees from levying specific charges or taxes to

[4] It should be noted, moreover, that as regards Appellants' containers, no practice of interchangeability of the containers with other shipping companies exists or has been alleged to exist by Appellees. This situation is contrary to the practice which prevails in connection with railroad rolling stock.

[5] In this respect, Appellants note that the stipulation of facts between the parties to this litigation referred only to containers owned by Appellants. *See,* Appendix, p. 29-33. Appellants are contending exemption from the property taxes levied by Appellees only with respect to such containers owned by Appellants or leased from other residents of Japan.

enable them to recover the cost of services, which directly or indirectly in any reasonable manner, support the limited activities of Appellants in the Appellees' jurisdictions.[6] Moreover, the imposition of the tax upon this basis would not appear to present undue administrative problems for state and local governments.[7] In any event, the Court has held that administrative convenience cannot cure a constitutionally invalid regulation or requirement. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

[6] It should be noted that Appellants, in their petition for rehearing to the California Supreme Court, Jurisdictional Statement and Brief made reference to the benefits of police and fire protection purportedly provided by Appellees because those were the only services alleged by Appellees in their briefs before the courts below to have been provided to Appellants. Appellees in their brief filed with this Court attempt to insert into the record a host of other services, through innuendo, speculation or overstatement, which they now suggest were provided to the Appellants. It should be noted that Appellants maintained virtually no business or commercial presence within the jurisdictions of Appellees. In fact, the activities of four of the Appellants were conducted almost in their entirety through unrelated shipping agents. One of the Appellants, Japan Line, maintained a separate wholly-owned subsidiary to perform administrative services on its behalf. Three of the Appellants established a wholly-owned subsidiary, which as a separate entity was fully subjected to California property taxation upon its own property. Appellees in their brief improperly suggest that Appellants themselves maintained a large and highly trained work force that was benefitted by the variety of services provided by the Appellees. In this respect, Appellants actually maintained a minimal number of persons within the jurisdiction of Appellees. Crane operators and others alluded to by Appellees in their brief are employed by independent companies, which presumably are subjected to property taxation upon their own property.

[7] It is understood that the Washington State Department of Revenue has already adopted procedures of this type in that it has instructed its county assessors that the determination whether goods are moving in foreign commerce should now be made under the same "physical movement" test used to determine the taxability of goods moving in interstate commerce. Washington Department of Property Tax Bulletin, No. 76-2 (25 March 1976).

V.

In the Determination of the Validity of This Tax in the Instant Situation, the Economic Realities of the Tax Rather Than Formalisms or Fictions Are Controlling.

In the concurring opinion in the *Washington Stevedoring Companies* case, it was suggested that the Court, in considering the validity of a tax under the Import-Export Clause, should be guided by an analysis of the economic realities underlying the imposition of the tax, rather than by artificial distinctions or pure formalisms.[8] In this respect, the fact that the California legislature has enacted the tax in question as a general *ad valorem* property tax in no way validates the application of the tax in the instant case to foreign-owned instrumentalities used solely in the import and export of goods.

Appellees, in their brief, candidly concede that:

> "The property tax, based upon the value of the property continuously or regularly in the jurisdiction and apportioned so as not to fall on a use outside the jurisdiction, rests upon an entirely different basis. *It is not imposed, and cannot be imposed upon property having only a temporary presence.* The continuity of the presence and its duration must be substantial, creating by themselves the assurance that the property is receiving benefits of more general nature than those reimbursed by fee."
>
> [Emphasis Added.]
> Appellees' Brief at 17.

[8] None of the cases cited by Appellees or their *Amici* deal with the imposition of state or local property taxes upon instruments used exclusively in foreign commerce. Appellees assert that *Maine* v. *Grand Trunk Ry. of Canada*, 142 U.S. 217 (1891) *and Bass, Ratcliff & Gretton, Ltd.* v. *Tax Comm.*, 266 U.S. 271 (1924) grant local governments the authority to impose a tax such as that involved herein. However, each of the foregoing cases involved the imposition of a franchise or privilege tax upon a foreign entity, which was admittedly conducting intrastate business within the taxing jurisdiction. The cases cited by Appellees imposing property taxes on rolling stock, as discussed *supra* at pages 10 and 11 hereof, do not appear to have involved foreign-owned instruments of commerce engaged exclusively in foreign commerce.

It is Appellants' position that, since their containers do not have an actual presence in Appellees' jurisdiction, except through the fiction of an assumed average presence, the incidence of the tax levied by Appellants can be found to exist only as a result of the repeated importation of different containers, which Appellees have stipulated are "in constant transit". Since the containers lack an actual *situs* or fixed presence in Appellees' respective jurisdictions, it is the act of importation, upon a continuing basis, which is the basis of the imposition of the California property tax. Although such tax is denominated by the State of California as an *ad valorem* property tax, it is submitted that, under the particular circumstances present herein, involving foreign-owned containers, used exclusively in foreign commerce, the incidence of such tax occurs because of the repeated entry or import of such containers and the tax must be regarded as an improper impediment upon international transportation activities. In the determination of the constitutionality of a state tax, the Court will be governed by the practical effect of the tax, rather than the descriptive label applied by the state legislature. *Harvester Co.* v. *Dep't. of Treasury*, 322 U.S. 340, 346 (1944); *and, Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

Despite the denomination of the tax as a general property tax, in practical effect in the instant case, it operates as a tax on imports and exports. As such, the tax is contrary to the established policy of reciprocal exemption followed by the United States and its trading partners in the

regulation of such activities and violates the Supremacy, Treaty, Commerce and Import-Export Clauses of the Constitution.

VI.

Inaccuracies or Distortions in Appellees' Brief Must Be Corrected.

Appellants do not wish to dignify the speculation and attempts to create confusion by Appellees and their *Amicus,* MSTC. However, these inaccuracies should not remain uncorrected before this Court.

A. Japanese Tax Is Imposed upon Containers.

It should be noted that both the Appellees and their *Amicus,* MSTC, in an effort to obfuscate the nature, effect and, indeed, the existence of the Japanese property tax, cite a certain treatise on Japanese taxation for the years 1975-1976 and state that it makes no reference to the Japanese property tax to which the containers involved herein were subjected. *See,* Appellees Brief at 11 and Brief of *Amicus* MSTC at 32.

The conclusion of the Appellees and their *Amicus* is incorrect.[9] The text relied upon by Appellees and their *Amicus* makes it clear that Japan imposes a full *ad valorem* tax upon personal property the registered owner of which is listed in the fixed assets tax ledger maintained by the appropriate municipality in Japan. The tax is imposed

[9] It should also be noted that the *Amicus* MSTC in its brief asserts that containers are admitted without entry under 19 C.F.R. §10.41b(a). The proper provision which permits admission of containers into the United States without entry is 19 C.F.R. §10.41a (a)(1).

upon the full value of the property without any reduction or credit for any foreign taxes imposed.[10]

B. The Assumptions of Appellees and Its *Amicus* Distort the Facts of This Case

The attempts of Appellees and their *Amicus* to distort the meaning of stipulated facts in the record are equally ineffective. Appellees and their *Amicus* MSTC at various points in their briefs attempt to introduce speculation that Appellants' containers may have engaged in purely intrastate or interstate, rather than foreign commerce. On this point the stipulation of the parties is clear and provides as follows:

> "5. Said containers are used exclusively for the transportation of cargo for hire in foreign commerce.
>
> 6. Said containers are never used for intrastate or interstate transportation of cargo except as continuations of international voyages.
>
> 7. Interstate or intrastate movement of empty containers is solely for the purpose of picking up cargo to be carried in foreign commerce, or returning the containers to ports (principally Los Angeles), all containers thereafter moving by Plaintiffs' vessels to foreign countries.
>
> 8. All of the loaded containers physically present within Los Angeles County on the lien dates were loaded with cargo either inbound from or outbound to foreign ports.
>
> 9. All empty containers physically present within Los Angeles County on the lien dates were awaiting loading of cargo to be carried on Plaintiffs' vessels in for-

[10] See, Guide to Japanese Taxes 1975-1976, *Zaikei ShoHo Sha,* Tokyo, Japan, ¶30, which is reprinted at Appendix A.

eign commerce, or carriage to other ports (principally in Japan) by Plaintiffs' vessels." Appendix at 30.

Appellees have in this respect ignored the clearly stated stipulation which leaves no doubt that: (i) the containers herein were used solely in international commerce; and (ii) the containers were never used in interstate or intrastate commerce. As this Court has held, the parties to a lawsuit are entitled to litigate a case upon the assumption that stipulated facts will be taken as proved, *Hackfeld & Co.* v. *United States,* 197 U.S. 442, 447 (1905), and that such a stipulation will preclude inquiry into those facts. *Mumma* v. *The Potomac Co.,* 33 U.S. (8 Pet.) 281, 285-86 (1835) (Story, J.). The stipulated facts recited above are the facts upon which the lower court decided this case and upon which the parties have agreed to test the merits of their respective positions. They should not, and cannot, be altered at this point in the litigation either by Appellees, which agreed to the stipulation of those facts or by any *Amicus,* which was not a party to the stipulation.

It is clear from the foregoing that the Appellees and their *Amici* MSTC have attempted to distort the stipulated facts, notwithstanding their claims that Appellants have introduced into the record additional data and information. Any data or information submitted by Appellants involving subsequent developments, such as the imposition of Oregon property taxes on foreign-owned containers or the subsequent letters of protest filed by foreign governments, are not only admissible, but Appellants are, in fact, under a duty to present such information, pursuant to the admonition of Mr. Chief Justice Burger in his concurring opinion in *Fusari* v. *Steinberg,* 419 U.S. 379, 390 (1974). Other data introduced by Appellants in their Brief to this Court fall within the scope of published data permitted to

be introduced in *Quong Wing* v. *Kirkendall,* 223 U.S. 59, 64 (1912).[11]

C. The Containers Involved Herein Are Principally Maritime Instruments

Although it is apparent that the subject containers are multi-modal, it is submitted that the containers are fundamentally instruments of commerce that are an extension of the ships which carry them. Containers were invented and designed essentially as a means of maritime transportation, which could be transported overland as a continuation and integral part of such maritime transport. In fact, the authorities cited by *Amicus* MSTC clearly evidence the advent of containerization as a maritime and shipping development. *See,* Simon, *The Law of Shipping Contain-*

[11] Appellees have raised a question in their supplemental brief concerning the purported benefit derived by foreign shipping concerns by virtue of the Home Port doctrine. Appellees contend, on the basis of a decision rendered by an intermediate state appellate court, *Zee Toys, Inc.* v. *County of Los Angeles* and its companion case *Sears, Roebuck & Company* v. *County of Los Angeles,* 85 Cal.App.3d 763 (Cal. App. 1978), that the Commerce Clause requires states to treat domestic and foreign persons alike on the basis that any other treatment would constitute exercise of a power reserved to the Federal Government. The Appellate Court's decision is based upon an incorrect legal premise which this Court has already rejected in *J.E. Raley & Bros.* v. *Richardson,* 264 U.S. 157 (1924).

Moreover, the discrimination which Appellees allege to exist in favor of foreign-owned containers is nonexistent since Appellants' containers are subject to property taxation at a higher effective rate than are domestic owned containers. The approach advocated by Appellees would subject Appellants' containers to cumulative burdens not imposed upon local business, a "'vice' characteristic of those taxes which have been held 'invalid'" by this Court. *See, Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 255 (1938). In the instant case, cumulative tax burdens are bound to occur because the United States has no mechanism to enforce the acceptance by foreign governments of the apportionment approach which the State of California is now urging upon them.

ers, 5 J. Maritime L. and Commerce 507 (1974).[12] Furthermore, the stipulation of facts expressly states that all of Appellants' vessels, on which the subject containers are carried, are specifically designed and constructed to accommodate the subject containers and carry only cargo in such containers. That containers are a development of maritime technology was recognized by the California Supreme Court in *Volkswagen Pacific, Inc.* v. *City of Los Angeles,* 496 P.2d 1237 (1972), where that court stated as follows:

> "Because the size of modern sea vans or 'containers' is dictated both by modern shipping technology and by the necessity of reducing the costs of shipping, the opening of such a container by an importer may not necessarily be 'for the sale or delivery of the separate parcels contained in it' (*F. May & Co.* v. *New Orleans, supra,* 178 U.S. at p. 508, 20 S. Ct. at p. 980), but may instead be accomplished so that the importer can by other means of transportation divert his imports to his outlets in different interior states."
>
> 496 P.2d at 1242.

Finally, the fact that the decision of the California Supreme Court in this case prompted the State of California to propose the extension of the property tax to foreign-

[12] The Authority relied upon by Appellees with respect to the nature of containers states as follows:

> "One of the most important technological developments in the transportation of goods by sea since steam replaced sail is the recent advent of the 'container revolution.'" Simon, *The Law of Shipping Containers,* 5 J. Maritime L. and Commerce 507 (1974).

Moreover, this source of authority further states that containers "[function] as ship's gear for cargo handling, and is usually provided by the carrier." *Id.* at 513. In this respect, it is interesting to note that much of the tratise authority cited by Appellees and *Amicus* MSTC regarding the nature of containers is found in the *Journal of Maritime Law and Commerce.*

owned aircraft used exclusively in foreign commerce is a further indication that the State of California regards the containers as equivalent to, or a part of, the vessel itself.

VII.
CONCLUSION

For the reasons stated herein, Appellants respectfully urge this Court to reverse the decision of the Court below and conclude that Appellants' containers are not subject to the imposition of personal property taxes levied by Appellees.

Respectfully submitted,

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APPENDIX A

30. *Fixed Assets Tax.* Fixed assets tax is paid by the registered owner of land, buildings, ships or any other kinds of depreciable assets as of January 1 of each year to a municipality (in exceptional cases, to a municipality and to a prefecture). "Registered owner" means the person registered as an owner of such property in a fixed assets tax ledger maintained by a municipality. This is not to be confused with the person who is registered as an owner in a real estate registration book maintained by a national juridical office for civil law purposes.

No fixed assets tax is levied on automobiles or other vehicles.

Land and buildings are taxed based on their value assessed by municipalities. Municipalities appraise the market value of land and buildings every three years. 1970 was the year of this appraisal. The basis for fixed assets tax used to be the same as the municipalities' appraised value. However, the increase in land price was so remarkably [sic] that taxpayer [sic] would be difficult to pay fixed assets tax based on market value of land. As the result, municipalities have adopted the assessment value which is different from the appraised value since 1964. . . .

• • •

With respect to the land for residential use, however, the assessment value is determined to be one-half of the appraised value for avoiding the heavy tax burden on the residential lands, and moreover the tax burden adjustment measures are maintained for 1973 and 1974. On the other hand, depreciable assets other than buildings are taxed based on the taxpayer's reported book value after depreciation deduction.

Appendix

The annual tax rate is 1.4%. In some relatively poor municipalities the tax rate is higher than 1.4%, but it may not be higher than 2.1% in any case.

Fixed assets tax is collected in April, July, December of the taxation year and February of the following year in four equal installments.

Some special concessions are granted in national law and in municipal statutes with regard to fixed assets tax.